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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

1007

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AUTOMATIC PAPER MACHINERY COMPANY, INC.,
Petitioner

vs.

MARCALUS MANUFACTURING COMPANY, INC.,
and **NICHOLAS MARCALUS**
Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT AND BRIEF IN
SUPPORT THEREOF.**

GEORGE E. MIDDLETON
Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

YOUR PETITIONER, Automatic Paper Machinery Company, Inc., prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the judgment of that Court in this cause filed on February 8, 1945 (Rec. p. 32). A petition for rehearing was denied on March 6, 1945 (Rec. p. 51).

A certified transcript of the record in this case, including the proceedings in the Circuit Court of Appeals, is furnished herewith in compliance with Rule 38 of the Rules of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a civil action brought by petitioner to recover damages for past infringement and to enjoin future infringement of claims 1, 2, 3, 4, 7 and 8 of Marcalus Patent No. 1,843,429, issued to petitioner on February 2, 1932 (Rec. p. 12). The patent is entitled "Mounting Cutters on Box Blanks", and the claims in suit relate to a machine for performing that operation.

The respondent, Marcalus, made the invention of the patent in suit while in the employ of petitioner, to whom he assigned the patent application for good and valuable consideration (Petitioner's Exhibit 6, Rec. p. 29). The application was allowed as filed (Findings of Fact, Rec. p. 2). Marcalus subsequently left petitioner's employ and organized the competing respondent company, which he controls (Findings of Fact, Rec. p. 2) and, when occasion arose, built and operated the accused machine (Rec. p. 31), which is the structural and functional equivalent of the patented machine. This action was thereupon brought and decided on a motion for summary judgment, the parties agreeing that there was no genuine issue as to any material fact. (In the brief before the Court of Appeals, respondents conceded that Marcalus and his company might be regarded as one and we shall so regard them here.)

Sued for infringement of his own patent, respondent denied infringement, although, as we shall see, what he really did was to deny validity. That the accused machine infringes the patent in suit in the ordinary sense is too plain for argument, as the District Court demonstrated by reading a typical claim on it, element for element (Rec. p. 34). Respondent's defense of non-infringement derives from his assertion that he is following the prior art and *a fortiori* cannot infringe. In support of this defense he came forward with an expired patent to one Inman, No. 1,036,851 August 27, 1912 (Rec. p. 25), on which he claimed to have

patterned the accused machine. Whether he did or not, both courts below found the machine of the patent in suit, the accused machine and the Inman machine to be substantially identical. As the Court of Appeals put it, after noting certain "trivial" distinctions: "the accused machine, that of Inman and that of the Marcaus patent are as alike as peas in a pod"; which being so, no troublesome questions of fact can arise to distract us. "The main issue of the case presents the question of estoppel by deed in patent property in classic simplicity", said the Circuit Court of Appeals.

Respondent contended that under the rule approved by this Court in *Westinghouse Electric & Mfg. Co., v. Formica Insulation Co.*, 266 U. S. 342, it was competent for him to rely on Inman for the purpose of narrowing the scope of his patent and so escape the odium—as well as the more solid disadvantages—of infringing it. That in so doing he might reduce that scope to nought and so effectively destroy the thing he had assigned, he regarded as a fortuitous—albeit fortunate—irrelevance with which he was in nowise concerned.

The Formica case succinctly states the doctrine of estoppel by deed to the assignment of patent property, and its limitations:

"* * * an assignor of a patent right is estopped to attack the utility, novelty or validity of a patented invention which he has assigned or granted as against any one claiming the right under his assignment or grant". (349)

"Of course, the state of the art can not be used to destroy the patent and defeat the grant, because the assignor is estopped to do this. But the state of the art may be used to construe and narrow the claims of the patent, conceding their validity. The distinction may be a nice one but seems to be workable." (351).

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Respondent fixed his attention upon the permissive part of the rule: "the state of the art may be used to construe and narrow the claims of the patent", overlooking the condition imposed: "conceding their validity".

The District Court did not overlook this condition, pointing out that Inman did more than construe and narrow the claims of the patent in suit; that it invalidated those claims. Said the Court:

"Since the claims must be construed in the light of the prior art, the assignor may invoke the prior art but for the sole purpose of limiting the claims and their co-extensive estoppel. The assignor, however, may not invoke the prior art for the ostensible purpose of limiting the claims, but for the real purpose of challenging their validity for lack of novelty. * * * The assignor will not be permitted to defeat the estoppel by indirection".

.

"If we were to permit the defense of non-infringement to rest on the Inman patent, the defendants would achieve, by indirection, the destruction of the Marcalus patent and the defeat of its assignment, and this the defendants may not do." (Rec. p. 7).

Whereupon a judgment was entered holding the claims in suit infringed and respondent estopped to deny the validity of his own patent (Rec. p. 9).

The Court of Appeals, although agreeing that the claims in suit were infringed in the sense that they read on the accused machine—a claim that reads on one pea in a pod unquestionably reads on all the other peas in the same pod—nevertheless shared respondent's preoccupation with the claim-narrowing aspect of the Formica rule and reversed the District Court, concluding—with frank dubiety:

"If we are correct in our conclusion that under the rule of the Formica decision the prior art measures

the extent of the anticipation and the anticipation ~~limits~~ the claims, anticipation being complete in the instant case, the claims of the patent must be limited to nought. We conclude that the District Court erred in holding the contrary." (Rec. p. 41)

But a claim whose scope is nought is indistinguishable from an invalid claim—is by definition an invalid claim. Thus the Court of Appeals, although in form adjudging the patent not infringed, has in substance adjudged it invalid, thereby rendering unworkable the nice but workable distinction observed by this Court in the Formica case and abolishing the doctrine of estoppel by deed to the assignment of patent property. It has permitted respondent to encompass the destruction of his own patent as effectively as though the doctrine of estoppel had never been heard of.

The rule of the Formica case is a simple rule. Nevertheless it has been variously interpreted, as the Court of Appeals observed:

"Decisions of the inferior federal courts since the Formica case present varying interpretations of the Supreme Court's ruling", (Rec. p. 37)

and then proceeded to document its observation. In particular it called attention to *Casco Products Corp. v. Sisko Tool & Mfg. Co.*, 116 F. (2d) 119 (cert. den. 312 U. S. 693), a patent license case, and *Buckingham Products Co. v. McAleer Mfg. Co.*, 108 F. (2d) 192, a suit against an assignor-patentee. In the former the Court of Appeals for the Seventh Circuit held that a defendant-licensee was not estopped to show that it followed the prior art, even though the application of that art plus ordinary mechanical skill should result in a structure on which the claims of the licensed patent might read. In the latter, as in the instant case, an assignor-patentee, sued for infringement of his own patent, showed a state of the art which, if offered by a third party, would have invalidated the patent in suit

and which, if disclosed to the Patent Office, would have defeated the application. Nevertheless, the Court of Appeals for the Sixth Circuit refused to permit the assignor to use that state of the art to destroy the assigned patent and defeat the grant, holding the assignor estopped to do that under the Formica rule.

The Court of Appeals for the Third Circuit in the instant case, commenting on these two decisions, said:

"It will be observed that the Casco decision is at one extreme and the Buckingham decision, at the other." (Rec. p. 38)

And later:

"We believe that the decision in the Casco case was correct." (Rec. p. 40)

The Third Circuit has, therefore, expressly refused to follow the Sixth in the latter's interpretation of the Formica rule.

JURISDICTION.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the act of February 13, 1925, c. 229 (28 U. S. Code, Sec. 347).

The decree of the Circuit Court of Appeals for the Third Circuit, which petitioner seeks to have reviewed, was entered on February 8, 1945 (Rec. p. 32) and a petition for rehearing denied on March 6, 1945 (Rec. p. 51).

THE QUESTION PRESENTED.

May an assignor of a patent, when sued for infringement of it, use the state of the art for the ostensible purpose of construing and narrowing the claims of his patent and showing that he does not infringe them, when the effect of so doing is to limit that scope to nought and so destroy the patent and defeat the grant?

REASONS FOR GRANTING THE WRIT.

1. The Circuit Court of Appeals for the Third Circuit in permitting an assignor of a patent, when sued for infringement of it, to use the state of the art to narrow the scope of his claims to nought, and thus destroy the patent and defeat the grant, has rendered a decision,

(a) in conflict with the controlling decision of this Court in the Formica case, and

(b) in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit on the same matter in *Buckingham v. McAleer, supra*, and in conflict with decisions of other federal courts on the same matter.

2. The inferior federal courts have variously interpreted this Court's ruling in the Formica case.

WHEREFORE YOUR PETITIONER respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Third Circuit to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals for the Third Circuit be reversed and that of the District Court affirmed; and that petitioner be granted such other and further relief as may be proper.

AUTOMATIC PAPER MACHINERY COMPANY, INC.

By GEORGE E. MIDDLETON,

Counsel for Petitioner.

New York, N. Y.

April 2, 1945.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the District of New Jersey, written by Judge Smith, appears at page 1 of the record and is reported in 54 F. Supp. 105. The opinion of the Circuit Court of Appeals for the Third Circuit (Circuit Judges Biggs, Goodrich and McLaughlin), written by Judge Biggs, appears at page 32 of the record and is reported in 64 USPQ 320..

JURISDICTION.

The jurisdictional statement appears in the accompanying petition.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition and need not be repeated here.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Third Circuit erred:

(1) In permitting the assignor-patentee, Marcalus, to use the state of the art to narrow the scope of his patent claims in support of the defense of non-infringement when the result of so doing was to narrow that scope to nought and so invalidate the patent.

(2) In failing to understand that under the rule in the Formica case, an assignor-patentee's right to use the state of the art to construe and narrow his patent claims when sued for their infringement is conditioned upon his concession of their validity and circumscribed by his estoppel

to use the state of the art to destroy the patent and defeat the grant; that the right of the assignee to exclude the assignor from the use of the patent assigned cannot be questioned even though as to the rest of the world the patent may have no efficacy and create no right of monopoly.

(3) In reversing the judgment of the District Court and holding the respondent not to infringe.

SUMMARY OF ARGUMENT.

This Court, in the Formica case, relaxed the theretofore strict rule of the Seventh Circuit that an assignor-patentee, sued for infringement of his own assigned patent, was estopped to show the state of the art, not only for the purpose of invalidating the patent, but for the purpose of narrowing and construing its claims as well. The state of the art might be used for the latter purpose, said this Court, but only on condition that the validity of the claims be conceded. Most federal courts since that time have understood the Formica rule and correctly applied it, but some, including the Court of Appeals for the Third Circuit, have not. The rule has been variously interpreted; it is in the public interest that it be correctly understood and uniformly applied.

ARGUMENT.

I

The doctrine of estoppel by deed is an ancient doctrine, having its genesis in the law of real property and long antedating our patent laws. But the applicability of the doctrine to the assignment of patent property has been recognized in this country for many years and was well stated by Mr. Chief Justice Taft in the Formica case:

“The analogy between estoppel in conveyances of land and estoppel in assignments of a patent right is

clear. If one lawfully conveys to another a patented right to exclude the public from the making, using and vending of an invention, fair dealing should prevent him from derogating from the title he has assigned, just as it estops a grantor of a deed of land from impeaching the effect of his solemn act as against his grantee. The grantor purports to convey the right to exclude others, in the one instance, from a defined tract of land, and in the other, from a described and limited field of the useful arts. The difference between the two cases is only the practical one of fixing exactly what is the subject matter conveyed. A tract of land is easily determined by survey. Not so the scope of a patent right for an invention." (350)

The practical difficulty of fixing exactly the subject matter conveyed when that subject matter is a patented invention had given rise to two contradictory rules: one, that the state of the art *might* be considered to determine the scope of the patent, conceding its validity; the other, that the state of the art *might not* be considered for that purpose. The first rule was applied by the federal courts generally and well stated by the Circuit Court of Appeals for the Sixth Circuit in *Noonan v. Chester Park Athletic Co.*, 99 Fed. 90, 91; the second was peculiar to the Circuit Court of Appeals for the Seventh Circuit and well stated by that Court in *Siemens-Halske Electric Co. v. Duncan Electric Co.*, 142 Fed. 157, 159. The resulting conflict was resolved by this Court in the *Formica* case:

"We think, however, that the better rule, in view of the peculiar character of patent property, is that the state of the art may be considered. Otherwise the most satisfactory means of measuring the extent of the grant the Government intended and which the assignor assigned would be denied to the court reaching a just conclusion." (350)

But then the Court added—and this is the gist of the decision:

“Of course, the state of the art can not be used to destroy the patent and defeat the grant, because the assignor is estopped to do this. But the state of the art may be used to construe and narrow the claims of the patent, conceding their validity. The distinction may be a nice one but seems to be workable.” (351)

Thus the more liberal rule of the Sixth Circuit was given preferment over the stricter rule of the Seventh, *but* the fundamental doctrine itself was left undisturbed:

“In view of the usual finality of patent decisions in the Circuit Courts of Appeal, this Court will not now lightly disturb a rule well settled by forty-five years of judicial consideration and conclusion in those courts.” (349)

This Court did not, we believe, intend that liberality in application should prove the rule's undoing.

Parenthetically it may be noted that the courts have not expressly distinguished between an assignor's estoppel to contest the validity of his assigned patent and a patent licensee's estoppel to contest the validity of the patent under which he is licensed. Although a good case might be made out for a stricter application of the rule to the assignor than to the licensee, it is not necessary to make a point of it here except to note that those cases in which the restraining influence of the estoppel has been relaxed the most have been cases in which a licensee's estoppel has been involved. That is, until the instant decision.

II

Since 1924, when the *Formica* case was decided, no assignor of a patent, sued for its infringement, has been denied the privilege of supporting a defense of non-infringement by showing the state of the art and thus narrowing

and construing the claims of his assigned patent. The courts have, however, required as the price of that privilege a concession of validity from the assignor-defendant and have inclined toward liberality in construing his claims.

In *Frank Associates, Inc. v. Columbia Narrow Fabric Co.*, (D. C. S. D. N. Y.) 33 F. Supp. 279, Judge Knox, faced with a situation analogous to the one here, said—after citing the Formica decision:

“But, though it be that the assignor of a patent may, by proof of prior art, limit the scope of its claims, and thus, successfully, deny their infringement, he is estopped from claiming the invalidity of the patent. It is true, also, that as between an assignor and his assignee, ‘the courts will give a liberal, rather than a narrow, construction to the patent assigned.’ * * *

“Following this rule of law, and, bearing in mind the defendant is estopped to deny the validity of the patent, I do not see how it can avoid a decree of infringement. A limitation of the claims which would exonerate defendant would be tantamount to a decree that the claims are invalid.” (282-283)

He then held the claims valid and infringed.

In *West v. Premier Register Table Co.*, 27 F. (2d) 653, an infringement suit against an assignor-patentee, the Circuit Court of Appeals for the First Circuit said:

“Observing the rule laid down in *Westinghouse Electric & Mfg. Co. v. Formica Insulation Co.*, supra, that the prior art may be shown to determine the scope of the patent as against an assignor but not to destroy the grant, it discloses nothing to limit or narrow the scope of the patent.” (656)

and held the claims in suit valid and infringed. But in a separate concurring opinion Judge Lowell said:

“I agree with the conclusion of the majority of the court. The assignor of a patent may not assert its in-

validity. All that the patentees did was to adopt for use in a printer's table an alining bar, which was old in the analogous art of drawing boards. Bergner United States patent No. 195,915, October 9, 1877. This, in my opinion, did not involve invention." (656)

Perhaps the most outspoken of all the courts in holding the assignor's right of limitation within decent bounds has been the Circuit Court of Appeals for the Sixth Circuit in the Buckingham decision, 108 F. (2d) 192, which the Court of Appeals for the Third Circuit expressly refused to follow in the instant case. There the state of the art, proven by a stranger, would admittedly have invalidated the patent in suit—the anticipation was complete. That case was perhaps stronger for the defendant than the instant case, because there it appeared that the assignee had actually known of an anticipating prior use before the patent in suit had been filed or assigned and intimations of fraud were not lacking. But the Court of Appeals refused to permit the assignor-defendant to use the state of the art to destroy the patent and defeat the grant. Nor would the Court permit the defendant to escape infringement by reading unexpressed limitations into the claims.

"Neither he [the assignor] nor those in privity with him may now be heard to say that his invention is narrower than what is plainly indicated by the claims, and so escape the charge of infringement under the rule of the Formica case." (195)

Judge Smith, the District Judge who found for petitioner here, correctly applied the rule of the Formica case. He saw, just as his Court of Appeals saw, that the Inman patent, offered by respondent for the ostensible purpose of narrowing and construing his claims, completely anticipated those claims. But he saw what his Court of Appeals apparently did not see: that Marcalus could not use Inman for the purpose of narrowing and construing his claims.

and at the same time concede their validity. The two were incompatible. He rightly concluded, therefore, as had Judge Knox under similar conditions in the Frank Associates case, that reliance upon Inman was tantamount to holding the patent in suit invalid, and as Marcalus was estopped to do that, he excluded Inman from consideration. The Court of Appeals, unhappily, failed to see that one cannot concede the validity of a claim whose scope has been reduced to nought.

III

These then are courts that have correctly understood and properly applied the Formica rule. But there have been courts that have questioned that rule in cases where the state of the art seemed to reduce the scope of the assigned patent to minuscule proportions, and some that have expressed views which, taken on their face, would seem to repudiate the rule.

Judge Kirkpatrick, in *Timken-Detroit Axle Co. v. Alma Motor Co.*, (D. C. D. Del.) 47 F. Supp. 582, had this to say:

"If no limitation at all, by reference to the specification, be imposed upon this claim we reach the point where the distinction which the Court spoke of in the Formica case—that is, using the prior art to construe and narrow a claim without letting it affect its validity—remains nice but becomes unworkable. The situation is that of a claim, completely anticipated by the prior art." (588)

He then proceeded to read unexpressed limitations into the claim, which not only gave it validity, but haply left it infringed as well—a conclusion eminently satisfactory to the plaintiff-licensor. The point of the citation is the judge's comment that, in the presence of a complete anticipation, the nice but workable distinction observed by this Court in the Formica case "remains nice but becomes un-

workable". It becomes unworkable only when, as in the instant case, the anticipation is allowed to defeat the estoppel. As long as the assignor or licensee is required to concede the validity of the claim, the distinction remains workable—and nice enough.

An odd misinterpretation of the Formica rule is found in *Dwight & Lloyd Sintering Co., Inc., v. American Ore Reclamation Co.*, (D. C. S. D. N. Y.) 44 F. Supp. 401. There Judge Bondy, after repeatedly affirming the estoppel rule, said this:

"Were it not for the estoppel to deny user, the court would find with reference to patents 1,433,349 and 1,433,351 that the devices used by defendant's sub-licensees alleged by plaintiff to have used these patents are substantially the same as the device disclosed by patent 916,393, which was part of the prior art relied on by defendant. The claims of patents 1,433,349 and 1,433,351 accordingly will not be interpreted to include the devices used by defendant's sub-licensees." (403)

Obviously, it gives a plaintiff little comfort to refrain from invalidating his patents while interpreting them so as to leave them not infringed: Judge Bondy having reached his conclusion by intuition, proceeded to organize his premises *a posteriori*.

But it remained for the Court of Appeals for the Seventh Circuit, in pre-Formica days the staunchest champion of the estoppel doctrine, to give it the unkindest cut of all. In the *Casco Products* decision, 116 F. (2d) 119, that Court, after referring to the Formica rule and quoting from the Noonan decision, 99 Fed. 90, had this to say:

"Perhaps we should hesitate to enlarge upon this. Despite some trepidation, however, we assert the corollary rule to be that defendant is estopped to assert that patents under which it is licensed merely follow the teaching of the prior art, for to do so would

invalidate that which it has covenanted is valid; but that, by the same token, defendant is not estopped to prove that its devices are built wholly according to the teaching of the prior art and that everything necessary to their conception and construction was taught by such art, for such proof clearly negatives infringement. In other words if everything in defendant's construction was taught by the prior art and nothing included therein other than the application of such art, plus ordinary mechanical skill, then the mere fact that the device constructed reads upon the claims of patents, the validity of which it is estopped to deny, does not spell infringement." (121)

If it be argued that this case involved a licensee's estoppel, not an assignor's, and that a different result would and should have been reached had an assignor been sued, we can only answer ruefully that the Court of Appeals for the Third Circuit perceived no such distinction and used the reasoning of the Casco decision to vitiate an assignor's estoppel in the instant case.

IV

Respondent's counsel in argument and brief before the Court of Appeals urged that court to do away with the doctrine of estoppel by deed to the assignment of patent property on the ground that it was contrary to public policy. The disclosures of expired patents—so the argument ran—are within the public domain and to exclude anyone, even this respondent, from full and free enjoyment of them would be to deprive the public of rights that it had bought and paid for—an egregious and shocking injustice. This, said counsel, is a fundamental principle of our patent system. (But petitioner bought and paid for rights too. What of them?) The Court of Appeals accepted the argument, finding "cogent reasons . . . why the doctrine of estoppel by deed should be held to be inapplicable in the instant

circumstances", and dragged in old *Pro Bono Publico* (Rec. p. 41). But the public is being deprived of no rights when Marcalus is enjoined from infringing his own assigned patent; only Marcalus is being deprived—which seems right and just.

"As to the rest of the world, the patent may have no efficacy and create no right of monopoly; but the assignor can not be heard to question the right of his assignee to exclude him from its use", (349)

said Mr. Chief Justice Taft..

There is a public interest involved, to be sure, but that interest were better served by promoting fair dealing among men than by quixotically upholding "a fundamental principle of our patent system" which is not in jeopardy anyway. The principle is sound enough; this respondent is simply estopped to invoke it.

CONCLUSION.

The writ of certiorari in the Formica case itself was granted to resolve a conflict between two contradictory rules arising out of two different concepts of the doctrine of estoppel by deed to the assignment of patent property. An analogous conflict has now arisen between two interpretations of the rule enunciated by this Court in that earlier case. The Circuit Court of Appeals for the Third Circuit has misapprehended the rationale of that rule. We ask this Court to grant our petition in order that it may resolve the conflict, quiet the present confusion, and correct the errors of the Third Circuit Court of Appeals.

Respectfully submitted,

GEORGE E. MIDDLETON,
Counsel for Petitioner.

New York, N. Y.
April 2, 1945.

